

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE KENTUCKY STATE BOARD ON**  
**ELECTRIC GENERATION AND TRANSMISSION SITING**

In the Matter of:

THE APPLICATION OF THOROUGHbred	)	
GENERATING COMPANY, LLC FOR A MERCHANT	)	CASE NO.
POWER PLANT CONSTRUCTION CERTIFICATE	)	2002-00150
IN MUHLENBERG, COUNTY, KY	)	

**RESPONSE OF THOROUGHbred TO BREC'S**  
**MOTION AND RESPONSES OF WATROUS AND KU/LG&E**

Applicant, Thoroughbred Generating Company, LLC (“Thoroughbred”), files its Response to the December 16, 2003 Motion of Big Rivers Electric Corporation (“BREC”), December 17, 2003 Response of Gary Watrous (“Watrous”) and December 19, 2003 Response of Louisville Gas and Electric Company (“LG&E”) and Kentucky Utilities (“KU”) to void the conditional grant of a Construction Certificate to Thoroughbred for failure to agree to the Board’s Conditions without any reservation of rights. BREC’s Motion, supported by Watrous and KU/LG&E, and made without citation to any authority, is without merit for the reasons set forth below.

1. On December 16, 2003, Thoroughbred filed its Appeal For Review Of The Board’s December 5, 2003 Order in the Muhlenberg Circuit Court pursuant to KRS 278.712(5). As a result, the Board has been divested of jurisdiction over this matter unless and until it is remanded. *See Phelps v. Sallee, Ky., 529 S.W.2d 361, 365 (1975)* (holding that administrative agencies lose jurisdiction over matters upon entry of final orders subject to Appeal). Accordingly, Watrous’ contention that the Board retains jurisdiction until any Appeal is moot because Thoroughbred’s Appeal has been filed.

2. The conclusion that the Board's Order is final and appealable is unchanged even if further action is required of the Board. *See Telespectrum v. Public Serv. Comm'n*, 227 F.3d 414, 423 (6<sup>th</sup> Cir. 2000) (the possibility of further steps by an administrative agency does not make an order impacting an applicant's "day-to-day business" non-final and unappealable). As counsel for Watrous can attest, the unavailability of any further administrative remedies led to an Appeal of a similar order from the Board in the Kentucky Mountain Power matter, Case No. 2002-00149. *See Stacy v. Kentucky State Board of Electric Generation and Transmission Siting*, Knott Circuit Court, Case No. 02-CI-00264.

3. The finality of the Board's December 5, 2003 Order is even more compelling given that the enabling legislation for the Board does not provide for rehearing and agencies have no inherent power to reopen decisions unless such power is conferred by the agency's enabling legislation (which is not the case for the Board). *See Phelps, supra*, 529 S.W.2d at 365.

4. Moreover, as to the merits of BREC's Motion, Thoroughbred does not interpret the Board's Order as requiring it to accept the Conditions imposed while waiving its legal rights. Indeed, the Board is without such power in any event. As noted by the Supreme Court, "the Court of Justice of the Commonwealth will not abdicate its responsibility to provide citizens a forum to contest the actions of "administrative agencies notwithstanding administrative rules to the contrary. *Kentucky Lottery Corp. v. Casey*, 862 S.W.2d 888, 891 (1993). The Supreme Court's decision in *Casey* is consistent with the holding in the seminal case involving review of administrative agency action, *American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Comm'n*, Ky., 379 S.W.2d 450, 456 (1964) concluding that "[t]here is an inherent right of appeal from orders of administrative agencies where constitutional rights are involved, and section (2) of the Constitution prohibits the exercise of arbitrary power."

(Footnotes omitted.) *See also Smothers v. Lewis*, Ky., 672 S.W.2d 62, 64-65 (1984) (holding that other branches of government cannot encroach on the power of the judiciary); *See also Ky. Const.* § 14 (“All courts shall be open and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay”).

5. As noted in Thoroughbred’s Complaint, it accepts without objection the majority of the Conditions imposed by the Board. In an abundance of caution, Thoroughbred has filed its Written Statement accepting these Conditions subject to Appeal. Thoroughbred’s Appeal challenges or seeks clarification only as to Conditions K and L.

6. Thoroughbred believes that it can resolve some, or all, of its differences regarding the interpretation of Conditions K and L through its Interconnection Agreement negotiations with BREC and others resolving, or at least narrowing, the issues to be considered by the Muhlenberg Circuit Court.

7. Thoroughbred does not intend to act in any manner inconsistent with the Board’s Order. Thoroughbred recognizes that any construction activities it undertakes, at the present time, pursuant to the Construction Certificate granted to it must comply with the terms and conditions of the Board’s Order. Any construction activities that Thoroughbred begins will: (i) comply with all Conditions of the Board’s Order; (ii) not impact Conditions K and L; and (iii) not impact any party to this proceeding. Finally, the Board’s Order provides a reporting function to ensure Thoroughbred’s compliance with the Board’s Order that will confirm if all Conditions imposed by the Board have been met.

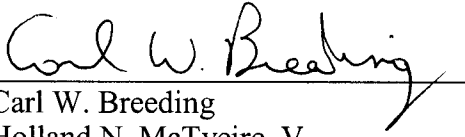
8. It is a well-settled proposition that a party may accept a portion of a judgment or order while appealing a part thereof. *See Overstreet v. Greenwell*, Ky., 441 S.W.2d 443, 447

(1969) (holding that the remedy for a judgment awarding past lost profits but not awarding future lost profits, was to appeal from the part of judgment disallowing the claim for future lost profits); *Moss v. Smith*, Ky., 361 S.W.2d 511 (1962) (satisfaction of judgment does not impact or impair right to appeal); *Ryan v. Payne*, Ky., 446 S.W.2d 273, 277 (1969); *See also Walden v. Walden*, Ky. App., 486 S.W.2d 57, 59-60 (1972); *Hundley v. Hundley*, Ky. App., 291 S.W.2d 544, 546 (1956). Moreover, that portion of an agency determination that is appealed is not stayed or otherwise compromised or delayed during the appeal absent an order from the circuit court or agency granting a stay. *See* KRS 13B.140(4). There simply is no reason or basis to void the Construction Certificate granted to Thoroughbred as Thoroughbred intends to comply with every Condition therein unless modified or changed on Appeal.

9. Finally, neither BREC nor any other party has been damaged by Thoroughbred's actions because no party has been asked to do anything contrary to the Board's Order.

For the reasons set forth above, BREC's Motion, supported by Watrous and KU/LG&E, should be denied because: (i) the Board is without jurisdiction to consider this matter while on Appeal; (ii) the Board cannot condition Thoroughbred's Construction Certificate on a waiver of its right to Appeal; (iii) Thoroughbred will not undertake any construction activity inconsistent with its Construction Certificate; and (iv) no party will suffer any damage as a result of Thoroughbred's Written Statement and Appeal.

Respectfully submitted,

  
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## CERTIFICATE OF SERVICE

It is hereby certified that a copy of the Response Of Thoroughbred Generating Company, LLC To BREC'S Motion was sent by United States First Class Mail, sufficient postage prepaid, to the following this the 23rd day of December, 2003.

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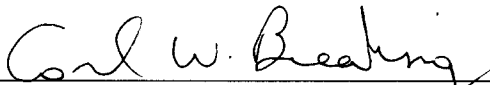
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